SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1050

SOUTHERN PACIFIC COMPANY, *Appellant,*
v.
PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *Appellee.*

On Appeal From the Supreme Court of California

and No. 1152

SOUTHERN PACIFIC COMPANY, *Appellant,*
v.
PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, ET AL., *Appellees.*

On Appeal From the United States District Court for the Northern District of California

PETITION FOR REHEARING

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May 28, 1969

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PETITION FOR REHEARING.

Appellant prays that this Court grant rehearing of its order of May 5, 1969, in Docket No. 1050, granting appellee's motion to dismiss and dismissing the appeal and that the Court note probable jurisdiction of the appeal, as prayed for in the jurisdictional statement filed February 14, 1969, herein. Appellant also prays that this Court grant rehearing of its order of May 5, 1969, in Docket No. 1152, granting appellees' motion to affirm and affirming the judgment, and that the

Court note probable jurisdiction of the appeal, as prayed for in the jurisdictional statement filed March 12, 1969, herein. Because these cases arise out of the same proceeding and because they involve substantially the same issues, the cases will be discussed together.

REASONS FOR GRANTING REHEARING AND NOTING PROBABLE JURISDICTION

On May 19, 1969, two weeks after the decisions in the instant cases, the Supreme Court decided *Frank* v. *United States,* —— U.S. —— (37 Law Week 4437). Although the Court affirmed the criminal contempt conviction there involved, the Court's opinion clarified the guidelines for determining whether particular criminal contempts are "petty" offenses. These guidelines are relevant here.[1] In *Frank* the Court first explained that the defendant in a criminal contempt case, as in all other criminal cases, "is entitled to a jury trial unless the particular offense can be classified as 'petty'." The Court then stated that "in prosecutions for criminal contempt where no maximum penalty is authorized, the severity of the penalty actually imposed is the best indication of the seriousness of the offense." But "if the statute creating the offense specifies a maximum penalty, then of course that penalty is the relevant period." The Court went on to indicate that a sentence of imprisonment for more than six months would not be "petty." The Court quoted 18 U.S.C. § 1, which defines a petty offense as "any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months *or a fine of not more than $500,* or both . . . ." (Emphasis added.)

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[1] *Frank* involved a contempt of a federal court, but the guidelines are applicable to state contempt proceedings under *Bloom* v. *Illinois*, 391 U.S. 194 (1968).

In the instant cases, appellee California Public Utilities Commission, under its authority to exercise a contempt power "in the manner and to the extent of the judicial power of contempt," is by state statute empowered to impose a penalty of $500 and/or 5 days' imprisonment for contempt. Here, however, the appellee completely avoided the statutory limits on its authority by proliferating the offenses. The alleged contempt consisted of violating one order which purported to require appellant to refrain from imposing fees for parking at its stations; but by adopting the device of counting each car for which a fee was charged as a separate contempt, appellee was able to magnify its power far beyond the petty offense category. It imposed a $22,000 fine, and if it had decided to proceed against appellant's officers individually, under the same reasoning it could have imprisoned them for 7½ months. Indeed by merely counting more cars, this power could have been expanded almost indefinitely—without any requirement of a trial by jury. This would seem to bring the case clearly within the rationale of *Bloom* and *Duncan* v. *Louisiana,* 391 U.S. 145 (1968).[2]

As Justices Black and Douglas stated in their dissent in *Frank* v. *United States:* "Those who commit offenses against courts should be no less entitled to the Bill of Rights than those who commit offenses against the public in general." *A fortiori,* those who commit offenses against administrative agencies should be no

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[2] See *James* v. *Headley,* — F. 2d — (5th Cir. April 9, 1969), a case involving right to counsel in which the Fifth Circuit held that when a state charges a defendant with two or more crimes, for which the maximum sentence is over six months' imprisonment—although none of the charges alone subjects him to a penalty that great—Bill of Rights protections must be afforded. As Judge Wisdom there wrote for a unanimous panel: "If a guilty person is convicted, the sum of the potential penalties is what is important to him—and to society."

worse off, at least in situations where the agency possesses the kind of punitive powers which the California Public Utilities Commission has exercised here.

Absence of a jury trial was not the only procedural defect in these cases. Here the agency issued, ex parte, an order against the appellant without affording any notice or hearing or even an opportunity to see the information on which the order was based. Appellant believed in good faith that the order was void under state law and consequently complied only in part. Under state law, the agency then had the option of going to court to enforce its order (Public Utilities Code § 2101), but it chose instead to proceed by itself. A contempt proceeding was instituted, the result of which was prejudged by at least one agency member, as demonstrated by public accusations he made to newspaper reporters prior to the hearing. At the hearing, the same agency member participated as both prosecutor and presiding officer, and the validity of the order was considered not subject to challenge. This is the procedural foundation on which the $22,000 fine by the agency without a jury trial is based. It cries out for correction. Nonetheless, no court has yet heard the case on the merits,[3] despite the fact that the California Supreme Court's refusal to hear the case is considered a decision on the merits and hence a ratification of appellee's procedures. *People* v. *Western Air Lines,* 42 Cal. 2d 621; 268 P. 2d 723 (1954). Presumably appellee's powers can now be exercised in the same peremptory and indefinitely expandable fashion

[3] Appellee issues approximately 2000 decisions and orders per year. About 20 petitions for review are filed, "and the [California] Supreme Court has granted, on the average, less than two reviews of Commission decisions each year. This means that less than one out of a thousand Commission decisions has been heard by any court in recent years." Francis N. Marshall, Report to the Constitution Revision Committee of the California Legislature (1967).

demonstrated here not only against corporate utilities but also against private individual citizens as well.

In sharp contrast, *Frank* v. *United States* is a good illustration of what happens when a Federal administrative agency seeks to enforce an order. The agency must go to Federal court and seek an injunction. It puts on its case and the defendant has the opportunity to challenge the order, introduce evidence, and cross-examine the agency's witnesses. This way the agency must, in the context of a formal judicial proceeding with attendant procedural safeguards, persuade a judge that its order was proper and that an injunction should issue. Only after this is accomplished and the injunction is violated may the court (not the agency) find the defendant in contempt.

We should also point out again that the state statute in these cases giving the agency the power to punish for contempt is squarely in conflict with the holding of *ICC* v. *Brimson*, 154 U.S. 447, 485 (1894), that an administrative agency may not be invested with the contempt power "consistently with due process of law." The only differences between the cases are that (1) this is criminal contempt, which compels the *Brimson* rationale even more strongly than the civil contempt there involved, and (2) *Brimson,* involving a *Federal* agency, was a question of Fifth Amendment due process, whereas this is Fourteenth. Appellee attempts to cast doubt on *Brimson* by saying that it is on old case. It is, but its holding that Federal administrative agencies may not be given the contempt power has never been questioned. Indeed, this holding has been cited with approval in two recent court of appeals cases: *Chicago* v. *FPC,* 385 F. 2d 629 (D.C. Cir. 1967) (dicta); *Shasta Minerals* v. *SEC,* 328 F. 2d 285 (10th Cir. 1964) (dicta).

We submit: (1) that the large fine imposed and the potential 7½ month imprisonment bring this case under the rationale of *Frank, Bloom*[4] and *Duncan* v. *Louisiana,* 391 U.S. 145 (1968); (2) that the proliferation of offenses, together with the other procedural defects, constitute such an abuse of the contempt power as to violate due process; and (3) that the California statute violates the holding of *Brimson* that an administrative agency may not be invested with the contempt power "consistently with due process of law." For all of these reasons, this Court should agree to hear the case.

CONCLUSION

For the reasons set forth above and in the jurisdictional statements, it is respectfully urged that rehearing be granted and that, upon such rehearing, probable jurisdiction be noted.

Respectfully submitted,

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May 28, 1969

[4] The recitation above of the procedural shortcomings of the agency contempt proceeding is the best explanation of why the statement in *De Stefano* (392 U.S. 631) limiting retroactivity of *Bloom* should not be extended to this case. The procedural safeguards and judicial restraint which preserve the basic elements of fairness in judicial contempt proceedings (even without a jury) are not present in an administrative proceeding such as the present one.

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

ROBERT L. PIERCE
Counsel for Appellant

Certificate of Service

I, Robert L. Pierce, one of the attorneys for Southern Pacific Company, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify, pursuant to Rule 33(3)(b) of the Revised Rules of the Supreme Court of the United States, that on the 28th day of May, 1969, I served a copy of the foregoing petition for rehearing as follows:

On all counsel of record for the California Public Utilities Commission, Peter E. Mitchell, William M. Bennett, A. W. Gatov, William Symons, Jr., and Fred P. Morrissey, as members of, and constituting said Commission, at the offices of the Commission, California State Building, San Francisco, California 94102; Thomas C. Lynch, at Fifth Street and Capitol Mall, Sacramento, California; John J. Ferdon, at 850 Bryant Street, San Francisco, California; Keith C. Sorenson, at Hall of Justice and Records, Redwood City, California; and Louis P. Bergna, at 190 W. Hedding, San Jose, California, by mailing a copy, in a duly addressed envelope, first class, postage prepaid, to each such party.

Dated this 28th day of May, 1969.

ROBERT L. PIERCE
Counsel for Appellant